

Report: LAW0705R

2011 MONTANA LEGISLATURE -62nd Regular Session

BILL DRAFT CHECKLIST REPORT

- LC1047 -

LC No. 1047 Short Title: Provide state eminent domain authority for federal lands

Drafter: Everts, Todd

Date of Request: 12/01/2010

Requester: Warburton, Wendy

By request of:

Subjects assigned: State Government

Federal Government

Applies to Requester Limit: NO

BR# 6

Review

	Initials	Date
Draft Completed	<i>[Signature]</i>	1-18
Legal	<i>[Signature]</i>	1/19
Editor	<i>[Signature]</i>	1/20
Drafter	<i>[Signature]</i>	1/20
Text Processing	<i>[Signature]</i>	1-20
Drafter	<i>[Signature]</i>	1-20
Executive Director	<i>[Signature]</i>	1/20

Redo

	Init	Dt	Init	Dt	Init	Dt
Drafter						
Legal						
Editor						
Drafter						
Text Processing						
Drafter						
Executive Director						

Bill Drafter Checklist

Drafter: Everts, Todd

Phone: 3747

Note: Each question on the checklist calls for a "yes", "no", or "N/A" response. Section number references are to the Bill Drafting Manual.

- 1 - Conformity with state and federal Constitutions considered (section 1-2)? **Make note of concerns below.** *(2)*
- 2 - Existing Montana statutes reviewed to avoid conflicts, duplication, or confusion (section 1-4)? *Y*
- 3 - Internal references checked (section 1-8)? *Y*
- 4 - Title contains one subject clearly expressed (section 4-4)? *Y*
- 5 - Code placement and applicability considered: codification instruction included in draft or message to codifier attached (section 4-19, Appendix Q)? *Y*
- 6 - Fiscal note may be required / probable (section 6-1)? *Y*
- 7 - Local government fiscal impact (section 6-2)? *Y*
- 8 - Fiscal impact requiring July 1 effective date (sections 4-26, 6-1)? *Y*
- 9 - Appropriations (section 6-1)? *Y*
- 10 - Revenue (section 6-1)? *Y*
- 11 - If state agency or committee bill, is "By Request" line included (section 4-3(4))? *Y*
- 12 - Note attached indicating source of draft (e.g., model act, other state statute, etc.) (section 1-7)? *Y*
- 13 - Tribal notification required (section 1-3)? *Y*
- 14 - Short bill title revised to reflect draft (section 4-4(11))? *Y*
- 15 - Changed/Added bill subjects (including fiscal note, revenue, local government impact, constitutional amendment)? *Y*
- 16 - Grants or extends rulemaking authority (section 6-3)? *Y*

Executive Director's Review:

- | | |
|--|---|
| <input checked="" type="checkbox"/> FISCAL NOTE REQUIRED | <input type="checkbox"/> REFERENDUM |
| <input type="checkbox"/> APPROPRIATION | <input type="checkbox"/> PREINTRODUCTION REQUIRED |
| <input type="checkbox"/> REVENUE | <input type="checkbox"/> LOCAL GOVERNMENT FISCAL IMPACT |
| <input type="checkbox"/> CONSTITUTIONAL AMENDMENT | <input type="checkbox"/> LEGISLATIVE APPOINTMENT REQUIRED |

Drafter's Notes (contacts, changes, discussions, etc.):

* Notified requester of constitutional concerns potential violation of

① property clause of U.S. Constitution Art IV, Sec 3, Cl 2

② Commerce Clause

Told requester that I agree w/ Utah's Office of Legislative Research and General Councils Legislative Review Note that is attached regarding the constitutional issues associated with this bill

28 **78B-6-503.5. Other property which may be taken.**

29 Property which may be taken under this part includes property possessed by the federal
30 government unless the property is owned by the federal government in accordance with the
31 United States Constitution Article I, Section 8, Clause 17.

Legislative Review Note
as of 11-30-09 4:01 PM

As required by legislative rule and practice, the Office of Legislative Research and General Counsel provides the following legislative review note to assist the Legislature in making its own determination as to the constitutionality of the bill. The note is based on an analysis of relevant state and federal constitutional law as applied to the bill. The note is not written for the purpose of influencing whether the bill should become law, but is written to provide information relevant to legislators' consideration of this bill. The note is not a substitute for the judgment of the judiciary, which has authority to determine the constitutionality of a law in the context of a specific case.

This bill authorizes the state to exercise eminent domain authority on property possessed by the federal government unless the property is owned by the federal government in accordance with the U.S. Constitution article I, section 8, clause 17, also known as the "Enclave Clause." The U.S. Supreme Court has held that eminent domain authority, or the right to take and dispose land for public use and necessity, belongs to the sovereign government of the land (i.e. federal or state government). See *Pollard v. Hagan*, 44 U.S. 212, 223 (1845). This bill contests the U.S. Supreme Court's opinion that the federal government is the sovereign of public land or property acquired by the federal government in accordance with federal constitutional authority other than the Enclave Clause.

In 1894 the U.S. Congress passed the Utah Enabling Act. Act Cong. July 16, 1894, ch. 138, 28 Stat. 107. The Act declared that as a condition of Utah's acceptance into the Union, the people of Utah "agree[d] that they forever disclaim[ed] all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States . . ." *Id.* at § 3. At this time, Utah also adopted the U.S. Constitution as a condition to joining the Union. *Id.*

Two clauses in the U.S. Constitution empower the federal government to own and retain land. The first, the Enclave Clause, authorizes the federal government to "purchas[e] by the Consent of the Legislature of the State" land for specific and enumerated purposes like military structures "and other needful Buildings." U.S. Const. art. I, sec. 8, cl. 17. This bill would not affect lands acquired by the federal government in accordance with the Enclave Clause.

The second, the "Property Clause," authorizes Congress "to dispose of and make all needful

Rules and Regulations respecting the Territory or other Property belonging to the United States . . ." U.S. Const. art. IV, sec. 3, cl. 2. Unlike the Enclave Clause, the Property Clause does not require that the federal government receive a state legislature's consent to own land. The U.S. Supreme Court has held that "Congress has the same power over [territory] as over any other property belonging to the United States; and this power is vested in Congress without limitation . . ." United States v. Gratiot, 39 U.S. 526, 537 (1840). *See also* Kleppe v. New Mexico, 426 U.S. 529, 539 (1976). Pursuant to its broad authority under the Property Clause, Congress may enact legislation to manage or sell federal land, and any legislation Congress enacts "necessarily overrides conflicting state laws under the Supremacy Clause." Kleppe, 426 U.S. at 543. *See* U.S. Const. art. VI, cl. 2.

Parties contesting federal control or ownership of public lands under the Property Clause have argued that the equal footing doctrine requires Congress' recognition of a state's sovereignty over public lands. "The equal footing doctrine is grounded in the idea that new states enter the Union with the same rights as the original states." Koch v. United States, DOI, Interior Bd. of Land Appeals, BLM, 47 F.3d 1015, 1018 (10th Cir. 1995) (citations omitted). The courts, however, have limited the equal footing doctrine to apply only to the title of land underlying navigable waters: "The equal footing doctrine simply does not cause land in non-navigable waters to pass from the federal government to the state." *Id.* at 1019. *See also* Texas v. Louisiana, 410 U.S. 702, 713 (1973). Furthermore, the equal footing doctrine requires political, not economic or geographic, equality between the states. United States v. Texas, 339 U.S. 707, 716 (1950). *See also* Texas v. Louisiana, 410 U.S. at 713.

Based on the courts' previous application of the Property Clause, there is a high probability that a court would hold that the federal government is the sovereign of public lands surrendered to or withheld by the federal government at the time of Utah's acceptance into the Union. *See generally* United States v. Nye County, 920 F. Supp. 1108, 1109 (D. Nev. 1996); Gibson v. Chouteau, 80 U.S. 92 (1872). In short, the state has no standing as sovereign to exercise eminent domain or assert any other state law that is contrary to federal law on land or property that the federal government holds under the Property Clause.

Office of Legislative Research and General Counsel